A

LO KUI CHEN

v.

DR KALAYARASU SUBRAMANIAM

B HIGH COURT SABAH & SARAWAK, SANDAKAN
DOUGLAS CRISTO PRIMUS SIKAYUN JC
[SUIT NO: SDK-22-60-12-2011]
14 AUGUST 2013

C ***CIVIL PROCEDURE****: Judgment and orders - Judgment in default of appearance - Whether judgment in default could be set aside - Whether service by ordinary post defective - Non-compliance with O. 10 r. 1 of Rules of the High Court 1980 - Failure to extract certificate of non-appearance when judgment entered - Non-disclosure of reasons for*
D *delay in extracting certificate of non-appearance - Whether non-compliance could be remedied - Rules of the High Court 1980, O. 1A and O. 2*

CIVIL PROCEDURE: *Motion - Interlocutory motion - Failure to serve notice of motion - Whether notice of motion an ex parte application - Whether service of motion mandatory - Whether application for leave to*
E *enter judgment in default should be made by writ of summons or notice of motion - Whether Senior Assistant Registrar had jurisdiction to hear and allow judgment in default*

In the present application ('encl. 7') the defendant, a medical
F practitioner, sought to set aside the judgment in default obtained by the plaintiff. The defendant contended that the judgment obtained by the plaintiff was irregular as the plaintiff's service on the defendant was defective and not in accordance with O. 10 r. 1(1) of the Rules of the High Court 1980 ('RHC'). The
G defendant also failed to produce a certificate of non-appearance ('certificate') when the plaintiff prayed for the judgment to be entered against the defendant on 9 May 2012 as required under O. 13 r. 7 of the RHC. The certificate was only taken out on 4 December 2012. The grounds raised by the defendant in setting
H aside the judgment in default, *inter alia*, were: (i) that the notice of motion to enter judgment was improper and invalid because it should have been made by way of summons pursuant to O. 13 r. 6(3) of the RHC; (ii) that the notice of motion was never served on the defendant as required under O. 13 r. 6(3) of the
I RHC; and (iii) that the Senior Assistant Registrar ('SAR') was

misled by the plaintiff that the notice of motion was an *ex parte* application. The court also considered whether the SAR had jurisdiction to hear and dispose matters such as motion to set aside or to enter judgment in default and whether the judgment in default should be set aside.

Held (allowing application with costs):

(1) The service on the defendant could only be affected by way of prepaid AR registered post and not by way of an ordinary registered post. Ordinary registered post could not be equated with prepaid registered post. There was obvious non-compliance to serve the defendant on the mode prescribed by O. 10 r. 1 of the RHC and the service by way of ordinary registered post was not good service. Where the law had prescribed the manner in which service was to be affected, such failure entitled the defendant to set aside the judgment in default obtained. (para 19)

(2) The plaintiff failed to extract and file the certificate as required under O. 13 r. 7 of the RHC when it applied for leave to enter judgment in default. The certificate was taken out by the plaintiff on 4 December 2012 but the judgment in default was obtained on 9 May 2012. The plaintiff did not disclose all material facts of the case related to the certificate. It was also not disclosed in the plaintiff's affidavit and submissions that, at the time when the judgment was extracted, the plaintiff had not been in possession or had not filed the certificate. Such non-disclosure damaged the plaintiff's case. (para 21)

(3) The use of the word 'must' in O. 13 r. 6(3) of the RHC indicated that the service on the defendant was a mandatory provision and the word 'must' was present both in the 1980 and 2012 Rules of the High Court. It was wrong for the plaintiff to inform the court that the motion was an *ex parte* application when it was not so. Such non-compliance was very serious and fatal. The plaintiff could not seek refuge in O. 1A and O. 2 of the RHC as the defects were not technical but was fundamentally defective. (para 25)

(4) The SAR wrongly heard and allowed the entry of the judgment in default of appearance contrary to O. 13 r. 6 of the RHC. Order 13 r. 6(3) of the RHC provided that any application for leave to enter judgment under para. (2) should

A be made by summons which must be, unless the courts otherwise orders and not withstanding anything in O. 62 r. 10 of the RHC be served on the defendant when judgment was sought to be entered. It was the prerogative of the plaintiff to proceed by way of an interlocutory motion for leave to
B enter judgment in default although the rule indicated that it should be by way of summons. Since the plaintiff proceeded by way of interlocutory motion, the application should be heard by a judge and not the SAR. (para 24)

C **(5)** Serious miscarriage of justice would be occasioned to the defendant if the judgment in default was not set aside. The suit should be disposed of in a proper trial since it was a medical negligence suit and highly contentious and triable issues would arise. Therefore, the judgment was set aside and
D the plaintiff was ordered to serve the defendant the writ properly and as soon as possible. (para 27)

Case(s) referred to:

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ
E *329 FC* ***(refd)***

Pacific Inter-Link Sdn Bhd v. Pemilik Kapal atau Vesel "Makatsarija" [2000] 2 CLJ 679 HC ***(refd)***

Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd [1997] 1 CLJ 300 CA ***(refd)***

F **Legislation referred to:**

Rules of the High Court 1980, O. 1A, O. 2, O. 8 r. 2, O. 10 r. 1(1), O. 12 r. 4, O. 13 rr. 6(3), 7, O. 62 rr. 4(2), 10

For the plaintiff - Marcel Jude Joseph; M/s Marcel Jude Joseph & Co
G *For the defendant - Chen Kok On; M/s Peter Lo & Co*

Reported by Sandra Gabriel

H

JUDGMENT

Douglas Cristo Primus Sikayun JC:

[1] This is an application under encl. 7 by the defendant to set aside the judgment in default of appearance entered against him
I on 9 May 2012.

[2] The defendant listed the following grounds in his application namely: A

[3] That the service of the writ of summons and statement of claim was irregular and invalid and not in accordance with O. 10 r. 1(1) Rules of the High Court 1980. B

[4] No certificate of non-appearance was produced by the plaintiff when praying for judgment to be entered on 9 May 2012 as required under O. 13 r. 7 Rules of the High Court 1980. It was only taken out on the 4 December 2012. C

[5] The notice of motion to enter judgment was improper and invalid because:

(i) It should have been made by way of summons and not by motion as per O. 13 r. 6(3) Rules of the High Court 1980; D

(ii) Affidavit in support of the notice of motion should not be deposed by the plaintiff's counsel; and

(iii) The notice of motion was never served on the defendant and should not have been heard *ex parte*. E

[6] The Senior Assistant Registrar was misled by the plaintiff's counsel when the counsel informed the court that the notice of motion was an *ex parte* application.

[7] The defendant filed his affidavit affirmed on 7 November 2012 in support of his application. F

[8] Whilst in opposition to the defendant's application, counsel for the plaintiff Mr Marcel Jude Joseph filed his affidavit in reply affirmed on 29 April 2013. G

[9] In his said affidavit counsel contends that the service was valid and proper as it was served in accordance with O. 10 r. 1 of the Rules of the High Court 1980. However no explanation was given why service on the defendant was done by way of registered post when the said O. 10 r. 1 specifically mentioned it to be done by way of 'prepaid AR registered' post. H

[10] Further counsel contends that since the defendant had not complied with O. 12 r. 4, the plaintiff is therefore entitled to enter judgment against the defendant. I

[11] The counsel further affirmed that the judgment in default obtained is regular as the plaintiff had complied with O. 13 r. 7. He says that he is authorised to sign pleadings on behalf of his client and therefore the argument raised by the defendant that counsel should not deposed the said affidavit is a trivial issue. He also said that the allegation that the body of the motion never prayed for a judgment to be entered is only a trivial argument raised to delay the fair conduct of this matter.

[12] Subsequent to this, both parties filed their respective submissions to encl. 7. I shall deal on the first issue ie, whether there was a proper service on the defendant.

[13] The defendant is a medical doctor practicing at Klinik Khoo, Lot 1D, Block H, Ground Floor, Bandar Ramai, Sandakan, Sabah. The plaintiff did not attempt personal service on the defendant despite the known address but chose instead to serve upon him by way of postal service.

[14] Order 10 r. 1(1) and O. 62 r. 4(2) both deal with service by registered post. But there is a difference between the two. The former is an alternative to personal service and method prescribed is by way of prepaid AR registered post. It is a more sophisticated version of the ordinary registered post.

[15] Whereas under O. 62 r. 4(2) service on a corporation may be effected by the use of the ordinary registered post.

[16] There is obvious difference between O. 10 r. 1(1) and O. 62 r. 4. One is by way of ordinary registered post and the other by prepaid AR registered post.

[17] When this stipulation was inserted as to the service by AR registered post in 1993, the Legislature must have intended to place a more onerous burden on the sender by requiring him to adduce proof through the production of AR card. Otherwise it will make no sense as to why prepaid AR registered post is preferred over the ordinary registered post.

[18] Hence, there is a specific mode of service by post under O. 10 r. 1(1). However the plaintiff chose to and adopted the mode of service of ordinary registered post. But as per O. 62 r. 4(2) that is only permissible for service on corporation.

[19] I am of the opinion that service on the defendant as the law stands now, can only be affected by the use of the prepaid AR registered post and not by way of ordinary registered post. It is unfortunate that despite carefully going through the plaintiff's affidavit in reply and the submission, the plaintiff did not address this issue of non-compliance of service by prepaid AR registered post. I don't think we can equate ordinary registered post with prepaid AR registered post. It is quite clear there was obvious non-compliance to serve the defendant on the mode as prescribed by O. 10 r. 1 and I cannot accept that the service by way of an ordinary registered post on the defendant as good service. Where the law prescribes the manner in which service is to be affected in a certain situation, failure to comply with the requirements may entitle the defendant to set aside the judgment obtained in default.

[20] As I have observed from the pleadings, this is a medical negligence suit which in my mind is highly contentious. Obviously there will be triable issues. Even if the service was regular I am inclined to set aside any judgment in default of this nature.

[21] I note that the plaintiff when applying for leave to enter judgment in default failed to extract and filed the necessary certificate of non-appearance as required under O. 13 r. 7. The said certificate of non-appearance was only taken out by the plaintiff on 4 December 2012, whereas the judgment in default was obtained on 9 May 2012. Unfortunately the plaintiff did not disclose all the material and full facts of the case related to this certificate of non-appearance. He did not disclose in his affidavit nor in his submissions that at the time when he extracted the said judgment he was not in possession or even filed for certificate of non-appearance. This non-disclosure is very damaging to the plaintiff's case.

[22] The Senior Assistant Registrar further do not have the jurisdiction nor authority to hear and dispose off matters such as motion to set aside or to enter judgment in default of appearance.

[23] Motions are heard by a High Court Judge in open court. It is never heard in chambers unless otherwise. Under O. 8 r. 2, except where an application may properly be made *ex parte*, no motion shall be made without previous notice to parties affected thereby.

[24] The notes of proceeding taken when the motion was heard indicate that counsel informed the court that it was an *ex parte* application. As a consequence of which the learned Senior Assistant Registrar wrongly heard and allowed the entry of the judgment in default of appearance and contrary to O. 13 r. 6. Pursuant to O. 13 r. 6(3) any application for leave to enter judgment under para. (2) shall be made by summons which must be unless the court otherwise orders, and notwithstanding anything in O. 62 r. 10, be served on the defendant whom it is sought to enter judgment. It is the prerogative of the plaintiff to proceed by way of an interlocutory motion for leave to enter the judgment in default though the above rule say that it should be by way of summons. However, since he chose to proceed by way of interlocutory motion, then that application should be heard by a judge and not a Senior Assistant Registrar.

[25] Further the use of the word "must" in O. 13 r. 6(3) indicate that this requirement to serve on the defendant against whom it is sought to enter judgment is a mandatory provision. This word is present in both the 1980 and 2012 Rules of the High Court. It is an absolute obligation to comply. It is wrong for the plaintiff to inform the court that the motion is an *ex parte* application when clearly it is not so.

[26] There are several authorities that allude to this word "must".

(a) *Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd* [1997] 1 CLJ 300; [1997] 1 MLJ 581;

(b) *Pacific Inter-Link Sdn Bhd v. Pemilik Kapal atau Vesel "Makatsarija"* [2000] 2 CLJ 679 at p. 686;

(c) *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329 FC.

[27] I consider this non-compliance to be very serious and fatal. I do not think the plaintiff can seek refuge in O. 1A and O. 2 as the defects are not technical in nature but rather they are fundamentally defective. Serious miscarriage of justice will be occasioned to the defendant if the default judgment is not set aside. Disposal of this suit should be dealt with by of a proper trial where evidence on both sides can be produced and heard more so since this is a medical negligence suit.

[28] I therefore set aside the judgment in default of appearance and order the plaintiff to serve the writ of summons on the defendant properly and as soon as possible so that pleadings can close and a trial date be fixed.

[29] I do not condone the indolent and cavalier manner the plaintiff had conducted her case. I award cost of RM10,000 reflective on our disdain on such practices.

[30] Order accordingly.